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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WARNER BROS. RECORDS INC., ET AL., No. C-07-01451 JSW (JCS)
Plaintiffs,
v.
JULIAN ROMERO,
Defendant.

**REPORT AND RECOMMENDATION
RE MOTION FOR ENTRY OF
JUDGMENT BY THE COURT
[Docket No. 12]**

**REPORT AND RECOMMENDATION
RE MOTION FOR ENTRY OF DEFAULT
JUDGMENT BY THE COURT
[Docket No. 12]**

I. INTRODUCTION

15 Plaintiffs, Warner Bros. Records Inc., Sony BMG Music Entertainment, BMG Music,
16 Priority Records LLC, Virgin Records America, Inc., Elektra Entertainment Group Inc., and
17 Interscope Records, bring a Motion for Entry of Default Judgment by the Court (the “Motion”) in
18 this copyright infringement action. Plaintiffs seek \$7,500 in statutory damages, \$480 (revised down
19 from \$550) in costs, and a permanent injunction. On May 24, 2007, the Clerk of the Court entered
20 default against Defendant, Julian Romero. The Court held a hearing on the Motion on August 3,
21 2007. Plaintiffs filed supplemental materials in support of the Motion on August 6, 2007. Having
22 considered Plaintiffs’ Motion, the accompanying submissions and all other evidence of record, the
23 Court recommends that the Motion be GRANTED.

24 | II. BACKGROUND

25 Plaintiffs are recording companies bringing suit against Defendant under the Copyright Act
26 of 1976, 17 U.S.C. §§ 101, *et seq.* (“Copyright Act”), for infringement of Plaintiffs’ copyrighted
27 sound recordings. *See* June 26, 2007 Declaration of Thomas Kerr In Further Support of Motion For
28 Default Judgment Against Defendant Julian Romero (“Kerr Decl.”), Ex. 1 (Complaint). Plaintiffs

1 contend that the Copyright Act grants each Plaintiff the exclusive right to reproduce and distribute to
2 the public their respective copyrighted recordings (“Copyrighted Recordings”). Compl. ¶ 14.
3 Plaintiffs also allege that they are, and at all relevant times have been, the copyright owners or
4 licensees of exclusive rights under United States copyright with respect to the Copyrighted
5 Recordings. Compl. ¶ 13. The Copyrighted Recordings at issue in this case include ten specified
6 recordings listed in Exhibit A of the Complaint as well as certain recordings listed in Exhibit B of
7 the Complaint.¹ Compl. ¶ 13, Exs. A-B. Plaintiffs provided copies of the copyright registrations for
8 these songs following oral argument, in response to the Court’s request. *See* Supplemental
9 Declaration of Matthew Franklin Jaska in Further Support of Motion for Default Judgment Against
10 Defendant Julian Romero (“Jaska Suppl. Decl.”), Exs. B-K.

11 Plaintiffs allege that Defendant violated their copyrights by using, and continuing to use, an
12 online media distribution system to download copyrighted recordings, to distribute them to the
13 public, and/or make them available for distribution to others. Compl. ¶ 15; Kerr Decl. ¶ 3. Plaintiffs
14 submitted a declaration detailing how they uncovered Defendant’s alleged acts of copyright
15 infringement. *See* Kerr Decl. ¶¶ 3-7. Specifically, in August 2004, Plaintiffs’ investigator detected
16 an individual using the KaZaA online media distribution system over a peer-to-peer file-sharing
17 network. Kerr Decl. ¶ 3. The identified individual had 1,529 music files on his computer and was
18 distributing the files to “millions of people” through the peer-to-peer network. *Id.* MediaSentry

20 ¹ The ten Copyrighted Recordings listed in Exhibit A of the Complaint are:

21 • “Longview,” on album “Dookie,” by artist “Green Day” (SR# 185-457)
22 • “Ether,” on album “Stillmatic,” by artist “Nas” (SR# 305-698)
23 • “Sweet Lady,” on album “Tyrese,” by artist “Tyrese” (SR# 237-788)
24 • “All or Nothing,” on album “O-Town,” by artist “O-Town” (SR# 294-872)
25 • “Until We Rich,” on album “War & Peace: Vol. 2,” by artist “Ice Cube” (SR# 287-151)
26 • “Zero,” on album, “Mellon Collie and the Infinite Sadness,” by artist, “Smashing Pumpkins” (SR# 183-904)
27 • “Cold Day In July,” on album “Fly,” by artist “Dixie Chicks” (SR# 275-086)
28 • “Dreams,” on album “Rumours,” by artist “Fleetwood Mac” (N39857)
 • “Keep On,” on album “Bad As I Wanna B,” by artist “MC Lyte” (SR# 225-726)
 • “Housewife,” on album “2001,” by artist “Dr. Dre” (SR# 277-983).

27 Compl. ¶ 13 & Ex. A. The Copyrighted Recordings also include “certain of the sound recordings listed
28 on Exhibit B,” which is a list of recordings on KazzaA, an online media distribution system, under the
username “Jay-R@kazaa.” Compl., Ex. B.

1 obtained the alleged infringer's IP address as well as "screenshots" of the individual's "share"
2 folder. Kerr Decl. ¶ 5. Through serving a subpoena on Pacific Bell Internet Services, the Internet
3 Service Provider associated with the IP address, Plaintiffs identified Julian Romero as the user of the
4 IP address committing the alleged acts of copyright infringement. Kerr Decl. ¶¶ 6-7. Plaintiffs
5 found Defendant's current address by searching SmartLinx Person Summary Report through Lexis
6 Nexis. Kerr Decl. ¶ 15. The SmartLinx Report generated an address of 350 E. Taylor Street, Apt.
7 1217, San Jose, California 95112, and is where Plaintiffs subsequently served Mr. Romero with the
8 Summons and Complaint. Kerr Decl., Ex. 5; Docket No. 6 (Summons).

9 Upon discovering Defendant's identity, Plaintiffs' counsel sent Mr. Romero a letter
10 informing him of the detection of copyright infringement and encouraged him to contact Plaintiffs'
11 representatives to resolve the matter prior to the commencement of litigation. Kerr Decl. ¶ 8.
12 Defendant never contacted Plaintiffs' representatives and Plaintiffs initiated this copyright
13 infringement action on March 13, 2007. Kerr Decl. ¶ 9; Docket No. 1 (Complaint). Plaintiffs
14 served the Summons and Complaint on Mr. Romero on April 12, 2007, at the Taylor Street address
15 in San Jose, California (see above), by substitute service on Christina "Doe." Docket No. 6; Kerr
16 Decl. ¶ 10. Defendant failed to answer or otherwise respond to the Complaint. Kerr Decl. ¶ 11.
17 Plaintiffs sent a letter to Defendant on May 14, 2007, at the same address, explaining that he was in
18 default and urging him to contact Plaintiffs' representatives to resolve the matter. Kerr Decl. ¶ 12,
19 Ex. 2. On May 24, 2007, the Clerk of the Court entered default against Defendant. Docket No. 9
20 (Entry of Default). The Clerk notified Defendant of the entry of default on May 25, 2007. Docket
21 No. 10 (Notification of Default).

22 On June 12, 2007, Plaintiffs filed this Motion seeking entry of default judgment and the
23 following relief: 1) \$7,500, constituting the minimum statutory amount of \$750 for each of the ten
24 acts of infringement alleged in Exhibit A of the Complaint; 2) \$550 in costs pursuant to Section 505
25 of the Copyright Act (later revised down to \$480); and 3) a permanent injunction pursuant to Section
26 502 of the Copyright Act. Mot. at 1. Plaintiffs' Motion does not seek an award of attorneys' fees.²

28 ² In the Complaint, Plaintiffs requested "reasonable attorneys' fees incurred herein." Compl.
¶ 19. However, in their Motion, Plaintiffs explicitly forego this request. Mot. at 5 n.2.

1 On June 13, 2007, Judge White referred Plaintiffs' Motion to the undersigned magistrate judge for
2 Report and Recommendation. *See* Docket No. 16.

3 Following oral argument, on August 6, 2007, Plaintiffs filed additional materials in response
4 to the Court's request. *See* Jaska Suppl. Decl. & Exhibits. In particular, Plaintiffs provided an
5 additional declaration addressing discrepancies in the moving papers regarding the cost of service of
6 process, as well as copies of the copyright registrations for the ten songs at issue. Plaintiffs clarified
7 that the cost of service of process was \$130 rather than \$200, as originally stated in the Motion.

8 **III. ANALYSIS**

9 **A. Service of Process**

10 The Court must "assess the adequacy of the service of process on the party against whom
11 default is requested." *Bd. of Trustees of the N. Cal. Sheet Metal Workers v. Peters*, No. C-00-395
12 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001); *accord Hartford Fire Ins. Co.*
13 *v. Cameron*, No. 05-4818 SC, 2006 WL 3646941, at *1 (N.D. Cal. Dec. 12, 2006). In this case,
14 Plaintiffs served the Summons and Complaint on Mr. Romero by substituted service on Christina
15 "Doe" in San Jose, California. *See* Docket No. 6; Kerr Decl. ¶ 10. The Summons describes
16 Christina "Doe" as "a competent member of the household . . . at the dwelling house or usual place
17 of abode of the party." Docket No. 6. To comply with the Federal Rules of Civil Procedure, service
18 may be effected upon an individual "by leaving copies [of the summons and complaint] at the
19 individual's dwelling house or usual place of abode with some person of suitable age and discretion
20 then residing therein . . ." Fed. R. Civ. P. 4(e)(2). Accordingly, the Court concludes that service of
21 process on Defendant was adequate.

22 **B. Legal Standard for Awarding Default Judgment**

23 Pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, the court may enter a
24 default judgment where the clerk, under Rule 55(a), has previously entered the defendant's default
25 based upon a failure to plead or otherwise defend an action. Fed. R. Civ. P. 55; *see PepsiCo, Inc. v.*
26 *Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002). The Court, however, may not enter a
27 default judgment against an infant or incompetent person unless they are represented in the action by
28 a guardian or other such representative. Fed. R. Civ. P. 55(b)(2). Default judgment also cannot be

1 entered against an individual in military service until after the court appoints an attorney to represent
2 the defendant. *See* 50 U.S.C. App. § 521. Here, Plaintiffs have provided sufficient evidence
3 demonstrating that Mr. Romero is not an infant, incompetent person, nor a person in the armed
4 services. *See* Kerr Decl. ¶¶ 15-16 & Exs. 5-6. The Court, therefore, may consider entering a default
5 judgment against Defendant.

6 Entry of default against a defendant, however, does not automatically entitle a plaintiff to a
7 court-ordered default judgment. *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986)
8 (affirming the district court's denial of default judgment despite the defendant's alleged failure to
9 answer the complaint). The decision to grant or deny a motion for default judgment is at the
10 discretion of the district court. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In
11 deciding whether to enter a default judgment, a federal court may consider the following "*Eitel*"
12 factors:

13 (1) the possibility of prejudice to the plaintiff, (2) the merits of
14 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4)
15 the sum of money at stake in the action; (5) the possibility of a dispute
concerning material facts; (6) whether the default was due to
excusable neglect, and (7) the strong policy underlying the Federal
16 Rules of Civil Procedure favoring decisions on the merits.

17 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "In applying this discretionary standard,
18 default judgments are more often granted than denied." *PepsiCo v. Triunfo-Mex, Inc.*, F.R.D. 431,
19 432 (C.D. Cal. 1999).

20 Upon an entry of default, the factual allegations of the plaintiff's complaint are assumed to
21 be true, except those relating to damages. *See Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th
22 Cir. 1977); *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). *See also* Fed. R.
23 Civ. P. 8(d) ("Averments in a pleading to which a responsive pleading is required, other than those
24 as to the amount of damage, are admitted when not denied in the responsive pleading."). A
25 defendant, however, is not held to admit facts that are not "well-pleaded" or to admit conclusions of
26 law. *Nishmatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Relief
27 accompanying a default judgment is further constrained by the remedies sought in the complaint.
28 *See* Fed. R. Civ. P. 54(c) ("A judgment by default shall not be different in kind from or exceed in

1 amount that prayed for in the [complaint].”); *see also Cal. Sec. Cans*, 238 F. Supp. 2d at 1175.

2 **C. Application of the *Eitel* Factors**

3 After assessing the *Eitel* factors, the Court finds that they weigh in favor of granting
4 Plaintiffs’ Motion For Entry of Default Judgment. Accordingly, the Court recommends that
5 Plaintiffs’ Motion be granted.

6 **1. Prejudice to Plaintiffs**

7 With respect to the first *Eitel* factor, the Court concludes that Plaintiffs will be significantly
8 prejudiced if a default judgment is not entered in their favor. Without an entry of default judgment,
9 Plaintiffs would be denied the right to judicial resolution of their claims and would likely be
10 “without other recourse for recovery.” *Cal. Sec. Cans*, 238 F. Supp. 2d at 177. Absent entry of
11 default judgment, Plaintiffs also could not receive injunctive relief and Defendant’s infringement
12 could continue. *See Capitol Records v. Barrera*, No. C 06-07212 JSW, 2007 WL 1113949, at *2
13 (N.D. Cal. Apr. 13, 2007). As Defendant allegedly continues to engage in acts of infringement
14 (Compl. ¶ 15), Plaintiffs would suffer substantial prejudice if the Court declined to enter a default
15 judgment.

16 **2. Sufficiency of the Complaint and the Merits of Plaintiffs’ Substantive
17 Claims**

18 Plaintiffs have adequately stated and supported their claim of copyright infringement.
19 Section 106 of the Copyright Act provides that “the owner of [a] copyright . . . has exclusive rights
20 to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or
21 phonorecords; . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by
22 sale or other transfer of ownership, or by rental, lease, or lending. . . .” 17 U.S.C. § 106. The statute
23 entitles the “legal or beneficial owner of an exclusive right under a copyright . . . to institute an
24 action for any infringement of that particular right committed while he or she is the owner of it.” 17
25 U.S.C. § 501(b).

26 A prima facie case of direct copyright infringement requires that a plaintiff establish: (1)
27 ownership of the allegedly infringed material; and (2) that the alleged infringer violated at least one
28 exclusive right granted to the copyright holders under 17 U.S.C. § 106. *See Marder v. Lopez*, 450

1 F.3d 445, 453 (9th Cir. 2006); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.
2 2001); *Barrera*, 2007 WL 1113949, at *3. Plaintiffs here have satisfied both elements of a copyright
3 claim. They have alleged that they own the copyright registrations for the ten sound recordings
4 listed
5 in Exhibit A of the Complaint. Compl. ¶ 13. They have also provided copies of the copyright
6 registrations for these recordings. Jaska Suppl. Decl., Exs. B-K. Plaintiffs also have demonstrated
7 that Mr. Romero used an online media distribution system to download the Copyrighted Recordings
8 and distribute them to the public or make them available for distribution to others. *See Kerr Decl.* ¶¶
9 3-7; Compl. ¶ 13. The allegations and evidence are therefore sufficient to support a claim for
10 copyright infringement.

11 **3. The Sum of Money at Stake**

12 The sum of money at issue in this action is not disproportionate or unreasonable. *See*
13 *Barrera*, 2007 WL 1113949, at *3. Plaintiffs seek to recover the minimum amount of statutory
14 damages for each of the ten alleged instances of infringement under 17 U.S.C. § 504(c) and costs
15 incurred in bringing suit pursuant to 17 U.S.C. § 505. Mot. at 8, 13; 17 U.S.C. §§ 504(c), 505.
16 While the Copyright Act allows for an award of attorneys' fees, Plaintiffs are only seeking to
17 recover their costs. *See* 17 U.S.C. § 505. As Plaintiffs request only the minimum amount of
18 statutory damages and costs, this factor also weighs in favor of granting Plaintiffs' Motion.

19 **4. The Possibility of a Dispute of Material Facts**

20 There is no apparent dispute concerning the material facts of this case. Defendant has failed
21 to appear in the action, and because default has been entered, all well-pleaded allegations in the
22 Complaint, except those relating to damages, are assumed to be true. *See Discovery Commc'nns, Inc.*
23 v. *Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1288 (C.D. Cal. 2001). Furthermore, as noted above,
24 Plaintiffs sufficiently alleged and supported the elements of a copyright infringement claim with
25 evidence of both copyright ownership and acts of infringement.

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1 **5. Whether Default was Due to Excusable Neglect**

2 There is also no evidence in the record to suggest that default resulted from Defendant's
3 excusable neglect. Upon discovering Mr. Romero's identity, Plaintiffs' counsel sent him a letter
4 alerting him to the acts of infringement and advising him to contact Plaintiffs' representatives to
5 resolve the matter before the initiation of litigation. Kerr Decl. ¶ 8. Defendant never responded.
6 Kerr Decl. ¶ 9. As discussed above, Plaintiffs properly served Defendant with the Summons and
7 Complaint on April 12, 2007 by substituted service. *See* Docket No. 6 (Summons); Kerr Decl. ¶ 10.
8 Plaintiffs also sent Defendant a letter on May 14, 2007, notifying him that he was in default and
9 urging Defendant to respond to the Complaint or to contact Plaintiffs' representatives. Kerr Decl. ¶
10 12, Ex. 2. Defendant was also notified on May 25, 2007, that the Clerk of this Court had entered
11 default against him. Docket No. 10; Kerr Decl. ¶ 13, Ex. 3. Despite service and notification,
12 Defendant has not responded to Plaintiffs' Complaint or otherwise made an appearance before the
13 Court. Accordingly, the Court finds that the default did not result from excusable neglect.

14 **6. Policy Favoring Decisions on the Merits**

15 The federal courts prefer to decide cases on their merits when "reasonably possible." *Eitel*,
16 728 F.2d at 1472. This preference, however, is not dispositive. *See Kloepping v. Fireman's Fund*,
17 No. C 94-2684, 1996 U.S. Dist. LEXIS 1786, at *10 (N.D. Cal. Feb. 13 1996). When a defendant
18 fails to answer a plaintiff's complaint, a decision on the merits is "impractical, if not impossible."
19 *Cal. Sec. Cans*, 238 F. Supp. at 1177. Therefore, "the preference to decide cases on the merits does
20 not preclude a court from granting default judgment." *Kloepping*, 1996 U.S. Dist. LEXIS 1786, at
21 *10. The Court, therefore, may enter default judgment against Defendant.

22 **D. Relief Sought**

23 Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure, the relief requested in a
24 motion for entry of default judgment may not exceed the remedies sought in the complaint. Fed. R.
25 Civ. P. 54(c). Plaintiffs originally sought statutory damages for each infringement of the
26 Copyrighted Recordings, costs, reasonable attorneys' fees and permanent injunctive relief. *See*
27 Docket No. 1; Compl. ¶ 19. Plaintiffs are now seeking \$7,500 in statutory damages, \$480 in costs
28

1 and a permanent injunction. Mot. at 1. Plaintiffs have the burden of proving their damages. *See*
 2 *Cal. Sec. Cans*, 238 F. Supp. 2d at 1173.

3 **1. Statutory Damages**

4 The Copyright Act provides that a “copyright owner may elect, at any time before final
 5 judgment is rendered, to recover, instead of actual damages and profits, an award of statutory
 6 damages for all infringements involved in the action, with respect to any one work . . . in a sum of
 7 not less than \$750 or more than \$30,000 as the court considers just.” 17 U.S.C. § 504(c)(1).
 8 Plaintiffs here have requested only the minimum amount of statutory damages - \$750 for each of the
 9 ten acts of infringement listed in Exhibit A of Plaintiffs’ Complaint.³ The total amount of statutory
 10 damages sought is \$7,500.

11 Under Section 504 of the Copyright Act, a plaintiff need not prove actual damages in order
 12 to receive an award of statutory damages. *See L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149
 13 F.3d 987, 996 (9th Cir. 1998), *cert. denied* 525 U.S. 1141 (1999) (“Because awards of statutory
 14 damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages
 15 whether or not there is adequate evidence of the actual damages suffered by plaintiff. . . .”) (quoting
 16 *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)). Statutory damages under the
 17 Copyright Act are particularly appropriate in cases in which the “defendant has failed to mount any
 18 defense or to participate in discovery, thereby increasing the difficulty of ascertaining plaintiff’s
 19 actual damages.” *Jackson v. Sturkie*, 255 F. Supp. 2d 1096, 1101 (N.D. Cal. 2003).

20 Here, the damages sought by Plaintiffs are reasonable and appropriate in light of the finding
 21 that at least ten of the Plaintiffs’ Copyrighted Recordings were illegally downloaded and distributed.
 22 *See, e.g., Warner Bros. Records Inc. v. Novak*, 06-5342 (FLW), 2007 WL 1381748 (D.N.J. May 9,
 23 2007) (awarding plaintiffs the minimum amount of statutory damages for each instance of
 24 infringement, costs and injunctive relief); *Barrera*, 2007 WL 1113949 (same); *Priority Records LLC*
 25 *v. Rodriguez*, CV F 06-0484 AWI LJO, 2007 WL 120033 (E.D. Cal. Jan. 11, 2007) (same); *Sony*
 26 *Music Entm’t Inc. v. Elias*, CV03-6387DT (RCX), 2004 WL 141959 (C.D. Cal. Jan. 20, 2004)

27
 28 ³ Plaintiffs are not seeking damages for any of the Copyrighted Recordings listed in Exhibit B.

1 (same). Accordingly, the Court recommends that Plaintiffs be awarded \$7,500 in statutory damages
2 as requested in the Complaint and Motion.

3 **2. Costs**

4 Rule 54 of the Federal Rules of Civil Procedure states that “[e]xcept when express provision
5 therefor is made either in statute of the United States or in these rules, costs other than attorneys’
6 fees shall be allowed as of course to the prevailing party. . . .” Fed. R. Civ. P. 54(d)(1). Entry of
7 default judgment constitutes success on the merits. *See Sony Music Entm’t v. Global Arts Prods.*, 45
8 F. Supp. 2d 1345, 1347 (S.D. Fla. 1999). Plaintiffs have incurred cost of \$350 for filing the lawsuit
9 and \$130 for service of process. Kerr Decl. ¶ 17 (filing fee); Jaska Suppl. Decl., ¶ 3 & Ex. A
10 (service of process fee). Local Rule 54-3(a) specifically allows the Court to award such expenses.
11 N.D. Cal. Civ. R. 54-3(a). The Court therefore recommends that Plaintiffs receive \$480 in costs.

12 **3. Injunctive Relief**

13 Plaintiffs also request that the Court issue a permanent injunction to enjoin Defendant’s
14 copyright infringement. Specifically, Plaintiffs request that the Court issue the following injunction:

15 Defendant shall be and hereby is enjoined from directly or indirectly
16 infringing Plaintiffs’ rights under federal or state law in the
17 Copyrighted Recordings and any sound recording, whether now in
existence or later created, that is owned or controlled by Plaintiffs (or
any parent, subsidiary, or affiliate record label of Plaintiffs)
18 (“Plaintiffs’ Recordings”), including without limitation by using the
Internet or any online media distribution system to reproduce (i.e.,
download) any of Plaintiffs’ Recordings, to distribute (i.e., upload)
any of Plaintiffs’ Recordings, or to make any of Plaintiffs’ Recordings
available for distribution to the public, except pursuant to lawful
license or with the express authority of Plaintiffs. Defendant also shall
destroy all copies of Plaintiffs’ Recordings that Defendant has
downloaded onto any computer hard drive or server without Plaintiffs’
authorization and shall destroy all copies of these downloaded
recordings transferred onto any physical medium or device in
Defendant’s possession, custody, or control.

24 Mot. at 8-9. This is the same injunction prayed for in the Complaint. *See* Docket No. 1.

25 The Copyright Act authorizes the Court to grant a permanent injunction “on such terms as it
26 may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). In
27 general, evidence of copyright infringement and the threat of future violations is sufficient to
28 warrant the granting of a permanent injunction. *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 940

1 (N.D. Cal. 1996) (finding that continued access to the equipment that allowed defendant to illegally
2 download and distribute game programs constituted a threat of future copyright violations); *see also*
3 *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (finding that a computer
4 servicing company that maintained computers in its inventory with protected software presented a
5 threat of future copyright violations and warranted an injunction); *Twentieth Century Fox Film*
6 *Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1072 (D. Ariz. 2006) (granting a permanent injunction upon
7 entry of default judgment in a copyright infringement action).

8 The Court may consider four factors in determining whether to issue a permanent injunction:
9 (1) irreparable harm; (2) success on the merits; (3) a balancing of competing claims of injury to the
10 parties; and (4) consideration of the public interest. *Global Arts Prods.*, 45 F. Supp. 2d at 1347.
11 “Injunctive relief is a traditional remedy for copyright infringement and is especially favored where
12 there is a history of continuing infringement and a substantial threat of continued infringement. In
13 such a case, a district court ought not only to issue a broad permanent injunction protecting present
14 works, but can protect works not yet created.” *Id* (citations omitted).

15 The elements required for issuing a permanent injunction are satisfied here. Evidence of
16 copyright infringement is presumed to give rise to irreparable harm. *See Elektra Entm’t Group Inc.*
17 *v. Bryant*, No. CV 03-6381GAF (JTLX), 2004 WL 783123, at *17 (C.D. Cal. Feb. 13, 2004); *see*
18 *also Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998) (“[I]n a copyright
19 infringement claim, a showing of a reasonable likelihood of success on the merits raises a
20 presumption of irreparable harm.”). The entry of default against Defendant establishes success on
21 the merits for Plaintiffs and therefore irreparable harm is presumed. *See Rodriguez*, 2007 WL
22 120033, at *5.

23 Plaintiffs also have adequately demonstrated that they will suffer irreparable harm if
24 Defendant is not permanently enjoined. Defendant’s use of an online media distribution system to
25 download and distribute copyrighted materials leaves Plaintiffs’ Copyrighted Recordings vulnerable
26 to “massive, repeated, and worldwide infringement.” *Twentieth Century Fox*, 438 F. Supp. 2d at
27 1073. “When digital works are distributed via the internet . . . every downloader who receives one
28 of the copyrighted works from Defendant is in turn capable of also transmitting perfect copies of the

1 works. Accordingly, the process is potentially exponential rather than linear, threatening virtually
2 unstoppable infringement of the copyright.” *Id.* at 1073 n.2. Furthermore, Defendant’s failure to
3 appear in this action provides the Court with no assurance that the Defendant’s infringement will not
4 continue. *See Jackson*, 255 F. Supp. 2d at 1103. The Court also cannot discern any detriment to
5 Defendant that would outweigh the harm to Plaintiffs if an injunction were issued.

6 The public interest also weighs in favor of granting a permanent injunction in this case.
7 Injunctions issued pursuant to Section 502 of the Copyright Act serve the public interest by
8 upholding copyright protections. *See Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476,
9 1499 (10th Cir. 1993). As noted by the Third Circuit, “the public interest can only be served by
10 upholding copyright protections and . . . preventing the misappropriation of the skills, creative
11 energies, and resources which are invested in the protected work.” *Apple Computer, Inc. v. Franklin*
12 *Computer Corp.* 714 F.2d 1240, 1255 (3d Cir. 1983). Accordingly, the Court finds that permanent
13 injunctive relief is appropriate in this case.

14 Rule 65 of the Federal Rules of Civil Procedure requires that “[e]very order granting an
15 injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; [and] shall
16 describe in reasonable detail . . . the act or acts sought to be restrained. . . .” Fed. R. Civ. P. 65(d).
17 Generally, “an injunction must be narrowly tailored to remedy only the specific harms shown by the
18 plaintiffs rather than to enjoin all possible breaches of the law.” *Iconix, Inc. v. Tokuda*, 457 F.
19 Supp. 2d 969, 998-1002 (N.D. Cal. 2006) (citing *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th
20 Cir. 2004)). As recently noted by the Court in a nearly identical action with plaintiffs seeking the
21 same injunction as requested here, the form and scope of Plaintiffs’ proposed injunction is in large
22 part reasonable and appropriate.⁴ *See* 06-04913 JSW (JCS) *Warner Bros. Records Inc. v. Pinheiro*.

23 Plaintiffs justifiably seek to prohibit the infringement not only of Plaintiffs’ existing
24 copyrighted recordings, but also future copyrighted recordings not yet created. Mot. at 12. An
25 injunction protecting against infringement of future copyrighted works is permitted, and it is

26 _____
27 ⁴ The Court acknowledges that judges both within and outside of this District have come to
28 differing conclusions with respect to the specific language of permanent injunctions issued in this type
of copyright infringement action.

United States District Court
For the Northern District of California

1 appropriate to grant such an injunction upon entry of default judgment. *Universal City Studios v.*
2 *Martinez*, No. 06-01128 OWW-SMS, 2007 WL 587185, at *5 (E.D. Cal. Feb. 26, 2007) (citing
3 *Princeton Univ. Press v. Michigan Document Serv. Inc.*, 99 F.3d 1381, 1392-93 (6th Cir. 1996))
4 (“The weight of authority supports the extension of injunctive relief to future works.”); *see also*
5 *Global Arts Prods.*, 45 F. Supp. 2d at 1347-48 (granting a permanent injunction protecting both
6 current and future copyrighted works). It is also proper upon a showing of infringement to order the
7 destruction of all copies or phonorecords made or used in violation of the copyright owner’s
8 exclusive rights. 17 U.S.C. § 503(b); *Martinez*, 2007 WL 587185, at *5.

9 Plaintiffs are also entitled to an injunction that covers the Copyrighted Recordings and any
10 sound recordings owned or controlled by Plaintiffs or to which Plaintiffs are the licensees of
11 exclusive rights. *See Capitol Records, Inc. v. Schmidt*, No. 06-5433 SC, 2007 WL 155577, at *5
12 (N.D. Cal. June 7, 2007) (citing *Pickler Int’l Corp. v. Imaging Equip. Serv. Inc.*, 931 F. Supp. 18, 45
13 (D. Mass. 1995) (“[W]hen . . . there has been a history of copyright infringement which persuades
14 the court that there is a threat of future violations, an injunction may properly be entered which
15 applies not only to the works as to which infringement has already been adjudicated, but also to any
16 other works presently owned by plaintiff.”) (internal quotation marks omitted)).

17 Similarly, the injunction may extend to sound recordings owned or controlled by Plaintiffs
18 and their parent, subsidiary, or affiliate record labels. *See Warner Bros. Records Inc. v. Hughes*, No.
19 06-3112, 2007 WL 315356, at *2 (C.D. Ill. Jan. 31, 2007) (citing *Chicago Bd. of Educ. v. Substance,*
20 *Inc.*, 354 F.3d 624, 632 (7th Cir. 2003)). An injunction which did not include Plaintiffs’ related
21 companies would be rendered ineffective in the event that Plaintiffs undertook any reorganization
22 that transferred title to the copyrights to another of their related entities.

23 Plaintiffs’ proposed injunction is overly broad, however, in that it seeks to enjoin the
24 infringement of Plaintiffs’ rights under both federal and state law. Compl. ¶ 17. Plaintiffs’
25 Complaint alleges only federal claims pursuant to the Copyright Act and no state law claims have
26 been adjudicated. This provision of the proposed injunction is therefore not narrowly tailored to the
27 specific harms perpetrated by Defendant against Plaintiffs. *See Barrera*, 2007 WL 1113949 at *6;
28 *Malacara*, 2007 U.S. Dist. LEXIS 13421, at *19-20. Moreover, the Copyright Act preempts any

1 state law copyright claims, largely nullifying the protection afforded by enjoining infringement of
2 Plaintiffs' rights under state law.⁵ *See Laws v. Sony Music Entm't*, 448 F.3d 1134, 1137 (9th Cir.
3 2006). Accordingly, the injunction should only enjoin Defendant from infringing Plaintiffs' rights
4 under federal law.

5 **IV. RECOMMENDATION**

6 The Court RECOMMENDS that:

- 7 1) Plaintiffs' Motion for Entry of Default Judgment Against Defendant Julian Romero
8 be GRANTED;
- 9 2) The Clerk be directed to enter judgment for Plaintiffs and against Defendant in the
10 amount of \$7,500 in statutory damages and \$480 in costs; and
- 11 3) The Clerk be directed to enter judgement for Plaintiffs and against Defendant
12 enjoining Defendant from directly or indirectly infringing Plaintiffs' rights under
13 federal law in the following copyrighted sound recordings:
 - 14 • "Longview," on album "Dookie," by artist "Green Day" (SR# 185-457);
 - 15 • "Ether," on album "Stillmatic," by artist "Nas" (SR# 305-698);
 - 16 • "Sweet Lady," on album "Tyrese," by artist "Tyrese" (SR# 237-788);
 - 17 • "All or Nothing," on album "O-Town," by artist "O-Town" (SR# 294-872);
 - 18 • "Until We Rich," on album "War & Peace: Vol. 2," by artist "Ice Cube" (SR# 287-151);
 - 19 • "Zero," on album "Mellon Collie and the Infinite Sadness," by artist "Smashing
20 Pumpkins" (SR# 183-904);
 - 21 • "Cold Day In July," on album "Fly," by artist "Dixie Chicks" (SR# 275-086);
 - 22 • "Dreams," on album "Rumours," by artist "Fleetwood Mac" (N39857);
 - 23 • "Keep On," on album "Bad As I Wanna B," by artist "MC Lyte" (SR# 225-726);
 - 24 • "Housewife," on album "2001," by artist "Dr. Dre" (SR# 277-983);

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27 ⁵ At oral argument, Plaintiffs' counsel asserted that the reference to state law is justified because
28 federal copyright law does not apply before 1972. The Court is not persuaded by this argument,
however, because all of the copyright registrations at issue in this case were issued after 1972, and
because violations of state law are not asserted in the complaint. *See Jaska Suppl. Decl.*, Exs. B-K.

1 and in any sound recording, whether now in existence or later created, that is owned or controlled by
2 Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"),
3 including without limitation by using the Internet or any online media distribution system to
4 reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiffs'
5 Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except
6 pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy
7 all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or
8 server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings
9 transferred onto any physical medium or device in Defendant's possession, custody, or control.

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11 Dated: August 14, 2007

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13 JOSEPH C. SPERO
United States Magistrate Judge

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